

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Amendment of Parts 1, 21, 73, 74 and 101 of the)	WT Docket No. 03-66
Commission's Rules to Facilitate the Provision of)	RM-10586
Fixed and Mobile Broadband Access, Educational)	
and Other Advanced Services in the 2150-2162)	
and 2500-2690 MHz Bands)	
)	
Part 1 of the Commission's Rules - Further)	WT Docket No. 03-67
Competitive Bidding Procedures)	
)	
Amendment of Parts 21 and 74 to Enable)	MM Docket No. 97-217
Multipoint Distribution Service and the)	
Instructional Television Fixed Service to Engage)	
in Fixed Two-Way Transmissions)	
)	
Amendment of Parts 21 and 74 of the)	WT Docket No. 02-68
Commission's Rules With Regard to Licensing in)	RM-9718
the Multipoint Distribution Service and in the)	
Instructional Television Fixed Service for the Gulf)	
of Mexico)	
)	WT Docket No. 00-230
Promoting Efficient Use of Spectrum Through)	
Elimination of Barriers to the Development of)	
Secondary Markets)	

**The ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance,
Inc.**

Consolidated Reply to Oppositions to Petitions for Reconsideration

Pursuant to Section 1.429(g) of the Commission's rules, The ITFS/2.5
GHz Mobile Wireless Engineering & Development Alliance, Inc. ("IMWED")
hereby submits this Consolidated Reply Oppositions to Petitions for

Reconsideration (“Reply”) of the Commission’s Report and Order in the above captioned matter (“EBS/BRS Report and Order”).¹

General

In our Petition for Reconsideration in the above-captioned proceeding, IMWED put forward four proposals designed to promote and protect the educational nature of EBS as it enters the wireless broadband era.² In our Consolidated Opposition to Petitions for Reconsideration, we also supported aspects of the Petition for Reconsideration submitted by the Catholic Television Network and the National ITFS Association (“CTN/NIA”) concerning regulations on excess capacity leasing and the availability of essential equipment when a lease ends.³

The principal commercial entities using EBS spectrum---BellSouth Corporation (“BellSouth”), Nextel Communications (“Nextel”), and Sprint Corporation (“Sprint”), joined by trade association Wireless Communications Association International (“WCAI”)---responded with a torrent of objections to these pro-education positions. Collectively, their rebuttals spanned more

¹ *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, Report and Order (“EBS/BRS Report and Order”) and Further Notice of Proposed Rulemaking (“FNPRM”), FCC 04-135 (rel. July 29, 2004), 19 FCC Rcd 14165 (2004).

² IMWED petition for reconsideration, pp. 6-11.

³ IMWED consolidated opposition to petitions for reconsideration, pp. 15-16.

than 40 pages of pleadings.⁴ As well, less prominent commercial firms also objected to a many of the same proposals.⁵

As advocated by these Oppositions, here is the future of EBS:

- An EBS excess capacity lease can be essentially permanent, provided the underlying license is renewed.⁶
- No meaningful educational service need be provided with respect to digital operations.⁷
- Upon the expiration or termination of the lease, the EBS licensee need have no ability to retain the use of equipment that is essential to continue operation.⁸
- The commercial lessee could have the right to buy the EBS license, assuming a future revision of EBS eligibility standards.⁹
- Abusive leasing practices would be hidden from the public, and normally remain undisclosed to the Commission.¹⁰

Commercial opponents of regulatory safeguards have attacked IMWED's proposals vehemently and pervasively. While EBS licensees will have the power to lease excess capacity on education-friendly terms, as

⁴ Consolidated Oppositions to Petitions for Reconsideration of BellSouth, pp. i-ii, 7-13; Nextel, pp. 14-20, 23-26; Sprint, pp. ii, 2-9; WCAI, pp. 30-43.

⁵ Consolidated Oppositions to Petitions for Reconsideration of C&W Enterprises, Inc. ("C&W") pp. 3-4, Luxon Wireless ("Luxon"), pp. 3-6; Digital Broadcast Corporation ("DBC"), pp. 1-3; SpeedNet, LLC ("SpeedNet"), pp. 3-4; and Wireless Direct Broadcast System ("WDBS"), pp. 2-4.

⁶ Consolidated Oppositions to Petitions for Reconsideration of BellSouth, pp. 10-12, Nextel, pp. 14-20; Sprint, pp. 5-7; WCAI, pp. 30-35; Luxon, pp. 5-6.

⁷ While there would remain a 5% set-aside, it would be within the Commission's rules and policies for that percentage to be provided in the middle of the night, in geographically remote parts of the system's coverage area, etc. See Consolidated Oppositions to Petitions for Reconsideration of BellSouth, p. 9, WCAI, pp. 37-41.

⁸ Consolidated Oppositions to Petitions for Reconsideration of BellSouth, p. 12-13, WCAI, p. 32.

⁹ Consolidated Oppositions to Petitions for Reconsideration of Nextel, p. 25; WCAI, pp. 41-43, C&W, p. 3; DBC, p. 3; SpeedNet, p. 3; WDBS, p. 3.

¹⁰ Consolidated Oppositions to Petitions for Reconsideration of BellSouth, pp. 13, Nextel, pp. 24-25; Sprint, pp. 4-5; WCAI, pp. 35-37; C&W, pp. 3-4; Luxon, p. 6; DBC, pp. 2-3; SpeedNet, p. 4; WDBS, pp. 3-4.

Nextel argues,¹¹ industry parties would have no motivation to seek such wide-ranging deregulation if they did not believe they would be able to put it to use---all the while keeping deleterious results hidden through relaxed disclosure requirements.

These widespread attacks are an indication that the industry plans to use leasing practices to marginalize education in the 2.5 GHz band---in essence, to obtain through leasing a *de facto* ownership even though the Commission declined to allow *de jure* control in the EBS/BRS Report and Order. Indeed, if the Commission believed that licensee discretion alone was sufficient to preserve EBS service, it would have had no reason to bar the sale of EBS licenses to commercial parties.

The fact is that licensees hold spectrum not only for themselves, but also for the benefits that accrue to the public. The public interest mandates that EBS be preserved as an educational service. Just as commercial entities should not be allowed to own EBS spectrum, they must not be allowed to attain equivalent control over spectrum through leasing that their hold is tantamount to ownership.

WCAI accuses IMWED of seeking Commission “micro-management” of the EBS service.¹² Far from seeking regulation of small matters, IMWED asks the Commission to require concretely, and to maintain public data about, what its Rules identify as the primary purpose of the service:

¹¹ Consolidated Opposition to Petitions for Reconsideration of Nextel, p. 18.

¹² Consolidated Opposition to Petitions for Reconsideration of WCAI, p. 35.

Educational Broadband Service stations are intended *primarily* through video, data, or voice transmissions to further the educational mission of accredited public and private schools, colleges and universities providing a formal educational and cultural development to enrolled students.¹³ [Emphasis added.]

In sum, IMWED asks that the Commission keep its eye not principally on the details but rather on the big picture.

EBS Lease Term Limits

The Commission has long limited the length of EBS (formerly ITFS) excess capacity lease terms. In 1986, it found:

The Commission has allocated the scarce spectrum resource for a particular, valuable service, and has the responsibility to ensure its proper use. It seems unlikely that ITFS licensees can reliably forecast their ITFS needs beyond a certain number of years. It is not obvious that a prospective lessor is any more likely to lose income from its necessity to renegotiate terms periodically than to gain income from its ability to renegotiate terms periodically. What definitely is gained is the ITFS licensee's ability to respond to changing demand. The [10-year lease term limit] appears to be a reasonable compromise between the needs of the lessee and the responsibility of the lessor/licensee.¹⁴

Initially, no ITFS lease was allowed extend beyond the expiration of the current term of the underlying license, though the Commission later allowed for full 10-year lease terms, contingent on the license's being renewed.¹⁵

¹³ 47 CFR 27.1203(b).

¹⁴ Amendment to Part 74 of the Commission's Rules and Regulations With Regard to the Instructional Television Fixed Service, 59 RR 2d 1355 (1986), paragraph 50.

¹⁵ Amendment to Part 74 of the Commission's Rules With Regard to the Instructional Television Fixed Service, 10 FCC Rcd 2907, paragraph 38 (1995).

The 10-year limit on ITFS lease terms was extended to 15 years in 1997. In making that change, the Commission wrote:

...the conversion to digital operations, whether two-way or merely downstream, will entail a substantial increase in operational and infrastructure costs, and the investment community will require even far greater comfort regarding the long-term availability of excess capacity on ITFS channels. [Original footnote omitted.] In addition, we agree with the commenters who have suggested that a 15 year lease term limit will help to place wireless cable on a more equal footing with its competitors. Higher Education Alliance, for instance, argues that 15 years is the customary period for traditional cable franchises, so that extending the term limits here hopefully would enable wireless cable operators to access capital markets that traditionally support wired cable.¹⁶

Until 2000, limits on the length of ITFS leases were imposed by Commission policy, but not included in the Rules. Interestingly, the reason for rewriting Section 47 CFR 74.931(e) in 2000---when the limit first appears in the Rules---was not to memorialize a 15-year limit, but rather to clarify an issue concerning the grandfathering of leases which had been entered into prior to March, 1997.¹⁷

In the EBS/BRS Report and Order, the Commission subjected EBS and BRS leasing to the framework of the Secondary Markets rules and policies it adopted the prior year with respect to certain other spectrum bands.¹⁸ However, the Commission also found that several important policies applying

¹⁶ Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, 13 FCC Rcd 19112 (1997), paragraph 133.

¹⁷ Amendment of Parts 1, 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-way Transmissions, Report and Order on Further Reconsideration and Further Notice of Proposed Rulemaking, 15 FCC Rcd 14566, paragraph 11.

¹⁸ EBS/BRS Report and Order, paragraph 179.

to EBS leasing need to be continued, stating that: “...the substantive use requirements that have historically applied to ITFS must remain in effect in the spectrum leasing context...”¹⁹ The Commission goes on to list six such requirements, and states specifically: “[T]he lease term may not exceed 15 years.”²⁰ [Emphasis added.] In the same paragraph, the Commission adds: “We believe that the continued application of these substantial use limitations... will facilitate the traditional educational purposes of ITFS.”²¹

Some commercial entities filing Oppositions for Reconsideration have filled pages arguing that the Commission does not mean what it plainly said about EBS leasing.²² Sprint attacks the merits:

To the extent that NIA/CTN is requesting that EBS spectrum leases entered into after January 10, 2005 must be subject to 15-year lease terms, such request has no merit. The underlying goal of the BRS/EBS rule overhaul has been to promote flexibility and the efficiencies that result. As explained above, the public interest and spectrum management goals derived from the Commission’s secondary market leasing policies have been well-established and NIA/CTN does not address why the 15-year term limit is or could be consistent with these goals.²³

IMWED submits that it is commercial opponents of the 15-year lease term limit who don’t get it. Even though EBS is being transforming through the advent of wireless broadband, it has a long history of regulation that

¹⁹ *Id.* paragraph 181.

²⁰ *Id.*

²¹ *Id.*

²² See, for instance, the Consolidated Oppositions to Petitions for Reconsideration of the following parties. Nextel, p. 16: “Amidst the substantive use restrictions... there was a passing reference to the old fifteen-year lease term limitation that previously applied to all ITFS leases...” Bellsouth, p. 1: “[T]he Commission inexplicably included a 15-year limit on lease terms.” WCAI, p. 31: “WCA believes that NIA and CTN are engaged in wishful thinking when they proclaim that the Commission intended to retain its prior policies...”

²³ Consolidated Oppositions to Petitions for Reconsideration of Sprint, p. 6.

supports its educational mission, and continuing obligation to deliver educational service. For this reason, standard Secondary Markets procedures are inadequate as they pertain to EBS. The very newness of forthcoming EBS technologies and service sets underlines what the Commission found in the 1980s when it held that lease term limits are required because licensees cannot “reliably forecast their ITFS needs beyond a certain number of years.”²⁴

IMWED believes that it would be helpful, though not absolutely necessary, for the Commission now to include a 15-year term limit in the EBS Rules. However, in light of the record in this proceeding, the Commission clearly must now make an unambiguous policy statement that the limit continues to apply. Contrary to the arguments of many of the commercial parties with respect to this matter, it would be irrational and improper for the Commission to abandon a long-standing policy that remains apposite under present circumstances, and which the Commission affirmed less than a year ago in the EBS/BRS Report and Order.

The Filing of EBS Excess Capacity Leases

Until January 10 of this year, EBS licensees were required to file copies of excess capacity leases with the Commission, and thus the terms were available for public inspection (although many licensees expurgated portions of them, most commonly those pertaining to cash remuneration). In

²⁴ Amendment to Part 74 of the Commission’s Rules and Regulations With Regard to the Instructional Television Fixed Service, 59 RR 2d 1355 (1986), paragraph 50.

contrast, under the Secondary Markets framework the text of leases are not required to be filed.

Many commercial parties have opposed IMWED's request that the Commission, upon reconsideration, maintain the prior requirement that EBS licenses be publicly filed.²⁵ Nextel, for instance, argues that "[m]andating the public disclosure of thousands of lease agreements imposes enormous burdens on licensees and needlessly creates opportunities for collusion..."²⁶ It goes on to aver: "...IMWED fails to offer any legitimate reason why the terms of such lease arrangements, including those containing commercially sensitive information, should be made available to the public."²⁷

As described elsewhere in this Reply, the Commission imposes public interest requirements on EBS leases that are not relevant to other Secondary Markets transitions, such as the requirement for a 5% educational set-aside. As set forth in IMWED's Petition for Reconsideration, and reflected in the record of this proceeding, there is both the possibility for abuse and controversy associated with how this set-aside is embodied in practice.²⁸ In addition, numerous other customary excess capacity lease provisions bear

²⁵ Consolidated Oppositions to Petitions for Reconsideration of BellSouth, p. 13; Nextel, pp. 24-25; Sprint, p. 4; WCAI, pp. 35-37; C&W Enterprises, Inc. ("C&W") pp. 3-4, Luxon Wireless ("Luxon"), p. 6; Digital Broadcast Corporation ("DBC"), pp. 2-3; SpeedNet, LLC ("SpeedNet"), p. 4; and Wireless Direct Broadcast System ("WDBS"), pp. 2-3.

²⁶ Consolidated Opposition to Petitions for Reconsideration of Nextel, p. 24. Capitalization altered.

²⁷ *Id.*

²⁸ IMWED Petition for Reconsideration, p. 7. These recommendations were opposed by pleadings such as the Consolidated Oppositions to Petitions for Reconsideration of BellSouth, p. 9, and WCAI, pp. 37-41.

upon the public interest obligations of EBS licensees, since they govern facilities, operations, and financial support that influence educational service. If leases continue to be available for public inspection, it is likely that abusive practices will come to light promptly, and, indeed, many may be deterred entirely. If not, patterns of abuse are likely to accumulate to the point that they erupt into public scandal.

IMWED is at a loss to understand how the public filing of leases could lead to collusion, as Nextel posits. Each lease would be finalized prior to filing, so its terms could not be altered following disclosure due to collusion with another entity; indeed, if EBS licensees determined somehow to collude, they would be in such close contact that they would share information outside of Commission processes. What unexpurgated leases provide, however, is accurate market information not only about spectrum pricing, but also about complete packages of both cash and in-kind consideration received by EBS licensees. Under economic theory, the availability of accurate economic data facilitates, rather than impedes, the functioning of markets.

As the record in this proceeding demonstrates, EBS leasing has a history dating to 1983. Hundreds, and, as Nextel implies, perhaps thousands, of EBS leases have been concluded and filed with the Commission. The need to file such documents has not imposed “enormous burdens,” as Nextel maintains, or impeded transactions in the past. Now that electronic filing is so prevalent, it is simply not credible to maintain that

it is unduly burdensome to attach an electronic file containing the text of a lease.

License Purchase Options

In opposing IMWED's Petition for Reconsideration, numerous commercial commenters argued that they should be allowed to secure options to purchase EBS spectrum through excess capacity lease provisions, notwithstanding the fact that they are banned from buying such spectrum under current Commission Rules.²⁹

Nextel, for example, writes: "The Commission has already resolved the EBS 'eligibility question' by unambiguously precluding commercial ownership of any EBS station. [Footnote omitted.] Additional measures are pointless and unnecessary. The costly and invasive IMWED proposal serves no purpose and should be dismissed."³⁰

IMWED agrees that the Commission has unambiguously held that EBS licenses may not be sold to commercial entities. Based upon an extensive record, the Commission made a public interest finding on this point, and determined that it wishes to preserve EBS as an educational service. If such is the Commission's desire, it would be counterproductive to create a constituency of organizations like Nextel that hold purchase options on EBS spectrum that cannot be exercised until the eligibility restriction is lifted. Once such a constituency exists, it will badger every future

²⁹ Consolidated Oppositions to Petitions for Reconsideration of Nextel, p. 25; C&W, p. 3; DBC, p. 3; SpeedNet, p. 3; WDBS, p. 3; WCAI, pp. 41-43.

³⁰ Consolidated Oppositions to Petitions for Reconsideration of Nextel, p. 25.

Commission until its members can cash in such options. We thus disagree with Nextel that our proposal is pointless---and, if it were, we doubt Nextel would take the trouble to oppose it.

Respectfully submitted,

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Dated: March 9, 2005

Certificate of Service

I, Chris Artem, hereby certify that copies of the foregoing Consolidated Opposition to Petitions for Reconsideration have been served by first class mail this 9th day of March on the following:

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